

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>WALTER JOSE MIRANDA, # 26916-177,</b>	§	
<b>Petitioner,</b>	§	
	§	
<b>v.</b>	§	<b>CIVIL NO. 3:16-CV-1561-L-BK</b>
	§	<b>(3:01-CR-229-L-1)</b>
<b>UNITED STATES OF AMERICA,</b>	§	
<b>Respondent.</b>	§	

**FINDINGS, CONCLUSIONS AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE**

Pursuant to [28 U.S.C. § 636\(b\)](#) and *Special Order 3*, Petitioner’s *pro se* motion to vacate, set aside, or correct sentence under [28 U.S.C. § 2255](#) was referred to the United States Magistrate Judge. For the reasons that follow, it is recommended that the section 2255 motion be summarily dismissed as time barred.

**I. BACKGROUND**

In 2002, Petitioner pled guilty to five counts of robbery under [18 U.S.C. § 1951\(a\)](#) (counts 1, 3, 5, 11, and 15) and one count of possession of a firearm during a crime of violence under [18 U.S.C. § 924\(c\)\(1\)](#) (count 2), and was sentenced to 108 months’ imprisonment on counts 1, 3, 5, 11, and 15, to be served concurrently, to be followed by a consecutive sentence of 252 months on count 2. [Crim. Doc. 110 at 3](#). He did not file a direct appeal.

On June 21, 2016, Petitioner filed this section 2255 motion, challenging his sentence as unconstitutional under *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551, 2563 (2015), which held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA), 28 U.S.C. § 924(e), violates the Constitution’s guarantee of due process. [Doc. 1 at 4](#). [Doc. 2 at 4](#). Specifically, Petitioner asserts that [18 U.S.C. § 924\(c\)](#) is “unconstitutionally vague” in light of *Johnson* and, thus, the imposition of a consecutive term of imprisonment under

that statute was unconstitutional. *Id.*; [Doc. 4 at 6](#), 8. Petitioner also asserts that his counsel failed to file a direct appeal and the government violated the terms of the plea agreement. [Doc. 2 at 5-6](#).

Regarding the timelines of his section 2255 motion, Petitioner relies on [28 U.S.C. § 2255\(f\)\(3\)](#) and *Johnson*, which was recently found retroactively applicable to cases on collateral review in *United States v. Welch*, --- U.S. ---, 136 S. Ct. 1257 (2016). [Doc. 2 at 11](#); [Doc. 4 at 1](#).<sup>1</sup>

## II. ANALYSIS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a one-year statute of limitations for federal inmates seeking post-conviction relief under [28 U.S.C. § 2255](#), which the Court may consider *sua sponte* after providing notice and opportunity to respond. *See* [28 U.S.C. § 2255\(f\)](#); *Day v. McDonough*, 547 U.S. 198, 209-210 (2006) (addressing a similar provision applicable to state habeas petitions under [28 U.S.C. § 2254](#)).<sup>2</sup>

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<sup>1</sup> Section 924(c)(1)(A) provides for certain penalties for a person “who, during and in relation to any crime of violence..., uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” [18 U.S.C. § 924\(c\)\(1\)\(A\)](#). Under section 924(c)(3), a “crime of violence” means

an offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[18 U.S.C. § 924\(c\)\(3\)](#). Courts generally refer to the “(A)” clause of section 924(c)(3) as the “force clause” and to the “(B)” clause of section 924(c)(3) as the “residual clause.” Section 924(c)(3)(B) is similar, but not identical, to the language of the ACCA residual clause invalidated by the Supreme Court in *Johnson*.

<sup>2</sup> Here, Petitioner will have adequate notice and an opportunity to respond to the statute of limitations ruling during the 14-day period for filing objections to the findings, conclusions and recommendation. *See* [Magouirk v. Phillips](#), 144 F.3d 348, 359 (5th Cir. 1998) (Magistrate Judge’s findings and recommendation provided habeas petitioner reasonable opportunity to oppose application of the procedural default doctrine).

## A. Limitations

### 1. Section 924(c)(1) and (3)

Petitioner relies on [28 U.S.C. § 2255\(f\)\(3\)](#)<sup>3</sup> and *Johnson* to overcome the one-year limitations period in section 2255(f)(1) since, otherwise, his section 2255 motion is clearly untimely. Over 13 years have elapsed since his conviction first became final in 2002. See [Clay v. United States, 537 U.S. 522, 525 \(2003\)](#) (a judgment becomes final under section 2255(f)(1) when the applicable period for seeking direct review of a conviction has expired).

However, Petitioner's reliance on section 2255(f)(3) and *Johnson* is misplaced. *Johnson* has no bearing on Petitioner's conviction or sentence since Petitioner's sentence was not increased under the ACCA's residual clause -- the only provision that *Johnson* found to be unconstitutional. See [Johnson, --- U.S. ---, 135 S. Ct. at 2563](#) (calling into question *only* the residual clause of the ACCA). Rather Petitioner was sentenced under 28 U.S.C. § 924(c)(1)(A)(i) to a consecutive 252-month imprisonment term for using and carrying a firearm during a crime of violence. See [Crim. Doc. 158 at 13](#), Presentence Report (PSR) ¶ 71; [Crim. Doc. 158 at ---](#), Statement of Reasons (SOR) (reflecting the sentencing court's upward departure from the guideline to uphold the plea agreement for an aggregate sentence of 360 months' imprisonment pursuant to FED. R. CRIM. P. 11(e)(1)(C)<sup>4</sup> and U.S.S.G. §§ 5K2.0 and 5K2.21).

Moreover, even if Petitioner's sentence was enhanced under section 924(c)(3)'s residual clause, the United States Supreme Court has not held that the residual clause of section 924(c)(3)

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<sup>3</sup> Section 2255(f)(3) provides that the one-year period in which to file a [section 2255](#) motion runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

<sup>4</sup> The provision of FED. R. CRIM. P. 11(e)(1)(C) that governed the parties' agreement that a specific sentence was the appropriate disposition of the case is now found at FED. R. CRIM. P. 11(c)(1)(C).

is also unconstitutional under its reasoning in *Johnson*. Indeed, the United States Court of Appeals for the Fifth Circuit recently recognized that “*Johnson* did not address section 924(c)(3)(B)” and that the disagreement among the courts of appeals as whether to grant permission to file a successive 2255 petition based on the argument that *Johnson* applies to section 924(c)(3)(B) “demonstrates that the Supreme Court has not taken a position on whether *Johnson* applies to section 924(c)(3)(B).” *In re Fields*, --- F.3d ---, 2016 WL 3383460 at \*1 (5th Cir. 2016) (*per curiam*) (collecting cases and denying authorization to file a successive application). Thus, section 2255(f)(3), which applies only if the right is one “newly recognized by the Supreme Court,” has no application in this case.

## 2. Remaining Claims

Petitioner also asserts counsel failed to file a direct appeal and the government violated the terms of the plea agreement. [Doc. 2 at 5-6](#). However, as previously noted, his section 2255 motion is clearly untimely under section 2255(f)(1). Over 13 years have elapsed since his conviction first became final in 2002. In addition, [28 U.S.C. §§ 2255\(f\)\(2\)](#) and (4) are inapplicable here. Petitioner does not appear to base his claims on a government created impediment, and the facts supporting his remaining grounds for relief should have been known prior to the date on which his conviction became final.

Consequently, the section 2255 motion is clearly outside the one-year statute of limitations absent equitable tolling.

### **B. Equitable Tolling**

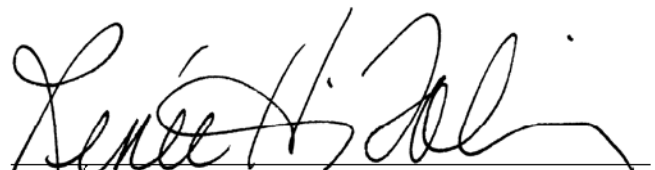
Petitioner posits no facts from which the Court can find that equitable tolling applies. *See Lawrence v. Florida*, [549 U.S. 327, 336 \(2007\)](#) (equitable tolling requires a petitioner to show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance

stood in his way and prevented timely filing”); *see also Menominee Indian Tribe of Wis. v. United States*, --- U.S. ---, 136 S. Ct. 750, 755-756 (2016). *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999) (“[E]quity is not intended for those who sleep on their rights.”) (quotation and quoted case omitted). Neither a prisoner’s unfamiliarity with the law nor his *pro se* status rises to the level of a rare or exceptional circumstance that would warrant equitable tolling. *See United States v. Petty*, 530 F.3d 361, 365-366 (5th Cir. 2008) (lack of legal training, ignorance of the law, and *pro se* status are insufficient to equitably toll the statute of limitations). Accordingly, Petitioner cannot carry his burden of establishing that equitable tolling is warranted in this case. *Id.* at 365.

### III. RECOMMENDATION

For the foregoing reasons, it is recommended that the motion to vacate sentence under 28 U.S.C. § 2255 be summarily **DISMISSED WITH PREJUDICE** as barred by the one-year statute of limitations.

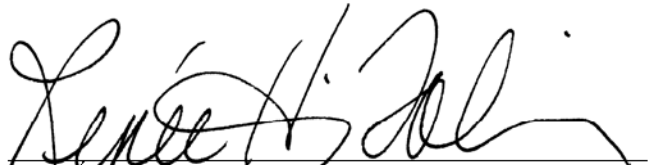
**SIGNED** July 5, 2016.



RENEE HARRIS TOLIVER  
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND  
NOTICE OF RIGHT TO APPEAL/OBJECT**

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* [28 U.S.C. § 636\(b\)\(1\)](#); [FED. R. CIV. P. 72\(b\)](#). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

  
RENEE HARRIS TOLIVER  
UNITED STATES MAGISTRATE JUDGE